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266 NLRB No. 21

D--9555
Eugene, OR

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DONALD EUGENE HARDING
d/b/a BROTHERS CONCRETE
CUTTING OF EUGENE

and

Case 36--CA--4189

OREGON, SOUTHERN IDAHO, WYOMING
& UTAH DISTRICT COUNCIL OF LABORERS,
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on July 14, 1982, by Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, herein called the Union, and duly served on Donald Eugene Harding d/b/a Brothers Concrete Cutting of Eugene, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint on August 19, 1982,[1] against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the National Labor Relations Act, as amended.

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[1] Unless otherwise noted, all dates are in 1982.

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[1] Unless otherwise noted, all dates are in 1982.

Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges that Respondent and the Union entered into a short-form collective-bargaining agreement effective from April 25, 1979, to May 31, 1983, binding Respondent to the terms of the Master Labor Agreements, including the current agreement, between Oregon-Columbia Chapter, Associated General Contractors of America, Inc., and the Union. The complaint further alleges that all laborers covered by the collective-bargaining agreement between Respondent and the Union as described above, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that, by virtue of Section 9(a) of the Act, the Union has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

With respect to the unfair labor practices, the complaint alleges that on or about February 15, notwithstanding Respondent's contractual commitment with the Union, Respondent failed to continue in full force and effect all the terms and conditions of its contract with the Union by: (a) unilaterally canceling its contract with the Union, including the vacation, trust, training, health and welfare, and pension trust provisions thereof; and (b) ceasing to make the prescribed monetary

contributions to the trust funds. Lastly, the complaint alleges that these terms and conditions of the contract are mandatory subjects of bargaining. Respondent failed to file an answer to the complaint.

On October 7, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, with appendices attached. Subsequently, on October 18, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has not filed a response to the Notice To Show Cause, and the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides, in pertinent part, as follows:

> The Respondent shall, within 10 days from the service of the complaint, file an answer thereto . . . . All allegations in the complaint, if no answer is filed . . . shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing, issued on August 19 and duly served on Respondent on August 20, specifically states that

Respondent shall, within 10 days of receipt thereof, file an answer with the Regional Director for Region 19, and that, unless it does so, all of the allegations in said complaint shall be deemed to be admitted to be true and may be so found by the Board. Further, according to the uncontroverted allegations of the Motion for Summary Judgment, on September 15 Respondent was notified in writing by counsel for the General Counsel that no answer had been received and that a motion for summary judgment would be filed if an answer were not received by September 27. Respondent neither filed an answer nor responded in any way to the General Counsel's communication. On October 7, counsel for the General Counsel filed the Motion for Summary Judgment herein, and on October 18 the Board issued a Notice To Show Cause why the General Counsel's motion should not be granted. Respondent did not file a response to the Notice To Show Cause, and, no good cause to the contrary having been shown in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all times material herein, a sole proprietorship with its principal office and place of business in Eugene, Oregon, where it is engaged in the construction industry as a contractor providing concrete cutting

services. During the past year, which period is representative of all times material herein, Respondent, in the course and conduct of its operations, provided services valued in excess of $50,000 for other enterprises within the State of Oregon, including Peter Kiewit, which enterprises are directly engaged in interstate commerce.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The unit

At all times material herein, the Union has been, and is now, the lawfully designated exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees:

> All laborers covered by the Master Labor Agreements between Oregon-Columbia Chapter, Associated General Contractors of America, Inc., and Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

B. The 8(a)(5) and (1) Charge

Since on or about February 15, Respondent has failed to continue in full force and effect all the terms and conditions of its contract with the Union by modifying and abrogating its contract in the following respects: (a) unilaterally canceling its contract with the Union, including the vacation, trust, training, health and welfare, and pension trust provisions thereof; and (b) ceasing to make the prescribed monetary contributions to the trust funds. These terms and conditions of employment which Respondent has failed to continue in full force and effect are mandatory subjects of bargaining.

Accordingly, we find that Respondent has, since on or about February 15, refused to bargain collectively with the Union as the exclusive representative of the unit employees by unilaterally modifying and abrogating its contract with the Union, and, in doing so, has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

We shall further order Respondent to make whole the employees in the unit found appropriate herein by paying all contributions to the Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers trust funds, as provided in the Master Labor Agreements to which Respondent is or was bound, which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments, and to post the attached notice.[2] See Haberman Construction Company, 236 NLRB 79 (1978); Vin James Plastering Company, 226 NLRB 125 (1976). This make-whole remedy shall include reimbursing

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[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213 (1979).

employees for contributions they themselves may have made for the maintenance of their coverage for benefits after Respondent unlawful ceased contributing, for any premiums they may have paid to third-party insurance companies for coverage heretofore provided by the trusts, and for any medical bills employees have paid to health care providers that the trusts would have covered, together with interest as provided in Florida Steel Corporation, 231 NLRB 651 (1977).[3] See Hudson Chemical Company, 258 NLRB 152 (1981); Kraft Plumbing and Heating, Inc., 252 NLRB 891 (1980). Respondent also will be required to preserve and, upon reqeust, make available to authorized agents of the Board all records necessary or useful in determining compliance with the Order herein.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Donald Eugene Harding d/b/a Brothers Concrete Cutting of Eugene is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All laborers covered by the Master Labor Agreements between Oregon-Columbia Chapter, Associated General Contractors

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[3] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

of America, Inc., and Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 25, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally modifying and abrogating its contract with the Union on or about February 15, 1982, and by failing to make the prescribed monetary contributions to the trust funds, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

6. By the aforesaid actions, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Donald Eugene Harding d/b/a Brothers Concrete Cutting of Eugene, Eugene, Oregon, his agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Refusing or failing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, as the exclusive bargaining representative of Respondent's employees in the following appropriate unit:

> All laborers covered by the Master Labor Agreements between Oregon-Columbia Chapter, Associated General Contractors of America, Inc., and Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing or failing to bargain in good faith with the Union by unilaterally abrogating Respondent's contract with the Union, including the vacation, training, health and welfare, and pension trust provisions thereof, and by ceasing to make the prescribed monetary contributions to the trust funds.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of Respondent's employees in unit set forth above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole the employees in the appropriate unit by transmitting the contributions owed to the Union's trust funds pursuant to the terms of Respondent's collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from Respondent's unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, vacation, and training funds after Respondent unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of Respondent's required contributions to such funds; and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. All payments to employees shall be made with interest, as set forth in the section of this Decision entitled ''The Remedy.''

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and

reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(d) Post at Respondent's principal office and a place of business in Eugene, Oregon, copies of the attached notice marked ''Appendix.''[4] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. January 31, 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

I WILL NOT fail or refuse to bargain collectively and in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, as the exclusive representative of the employees in the following unit appropriate for the purposes of collective bargaining:

> All laborers covered by the Master Labor Agreements between Oregon-Columbia Chapter, Associated General Contractors of America, Inc., and Oregon, Southern Idaho, Wyoming & Utah District Council of Laborers, Laborers' International Union of North America, AFL--CIO, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

I WILL NOT repudiate or fail to honor, abide by, and apply the terms of the collective-bargaining agreement between the Chapter and the Union referred to above.

I WILL NOT unilaterally discontinue the contributions to the health and welfare, pension, vacation, and training funds provided for in the applicable collective-bargaining agreement referred to above.

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I WILL, upon request, bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit described above, and I WILL embody in a signed agreement any understanding which may be reached.

I WILL honor, abide by, and apply the terms of the existing collective-bargaining agreement referred to above.

I WILL make whole unit employees by transmitting the contributions owed to the Union's health and welfare, pension, vacation, and training funds pursuant to the terms of the above-referred-to collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from my unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare, pension, vacation, and training funds after I unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical coverage in the absence of the required contributions to such funds; and for any medical bills they have paid directly to health care providers that the contractual policies would have covered.

I WILL pay to the employees appropriate interest on such moneys.

DONALD EUGENE HARDING
d/b/a BROTHERS CONCRETE
CUTTING OF EUGENE

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--442--7472.